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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC. and W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

— vs. —

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does the act of state doctrine bar adjudication of an action which requires the court to determine whether an award of a military contract by the Nigerian government resulted from the payment of bribes to high level government officials and whether it is the custom or practice of the Nigerian government to demand such payments?

PARTIES TO THE PROCEEDINGS BELOW

A description of the parties to the proceeding below was fully discussed in the petition for writ of certiorari.

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JURISDICTION

The United States Court of Appeals for the Third Circuit entered its order on May 2, 1988, reversing the decision of the district court dismissing the complaint. A timely petition for a writ of certiorari was filed on June 17, 1988. This Court granted the petition for a writ of certiorari on June 26, 1989. Petitioners allege jurisdiction under 28 U.S.C. § 1254(1) (1966 and Supp. 1989).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS

The following constitutional and statutory provisions are implicated in this case:

1. United States Constitution, Art. III.

2. The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(a)(2), which states:

> (a) Prohibited Practices. It shall be unlawful for any domestic concern, other than an issuer which is subject to section 30A of the Securities Exchange Act of 1934 [15 USC §78dd-1], or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer,

gift, promise to give, or authorization of the giving of anything of value to –

• • •

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of –

(A) influencing any act or decision of such party, official, candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business, to any person.

3. The Robinson-Patman Act, 15 U.S.C. § 13(c), which states:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

4. The federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(b), (c) and (d), which states:

> (b) It shall be unlawful for any person through a pattern or racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

5. The New Jersey Anti-Racketeering Act, N.J.S. 2C:41-2, which states:

> a. It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which he has participated as a principal within the meaning of N.J.S. 2C:2-6 to use or invest, directly or indirectly, any part of the income, or the proceeds of the income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in or the activities of which affect trade or commerce.

6. The judicially-created act of state doctrine.

STATEMENT OF THE CASE

Factual Background

In 1982, a New Jersey corporation, W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick"), through a subsidiary, W.S. Kirkpatrick & Co., International ("Kirkpatrick International"), entered into a contract with the Federal Republic of Nigeria to provide aeromedical equipment and to develop an aeromedical center at the Kaduna Air Force Base in Kaduna, Nigeria. The contract was awarded to Kirkpatrick International by the Ministry of Defense of the Nigerian government. (A. 81-117)

In approximately 1984, the United States Department of Justice commenced a grand jury investigation into the circumstances surrounding the grant of the contract. Kirkpatrick, which was then under new management, cooperated with the Government's investigation. Indeed, Kirkpatrick uncovered evidence which showed that an agent hired by its prior management, Benson "Tunde" Akindele ("Akindele"), had represented to Kirkpatrick that Nigerian officials demanded that Kirkpatrick pay bribes to them in order to be awarded the contract. Two interoffice memoranda, the first dated March 30, 1981, the second dated March 8, 1982, (the "Memoranda") (A. 212-222) showed that Akindele told Kirkpatrick's former chairman that Kirkpatrick should be prepared to pay a sales commission totaling twenty percent (20%) of the contract price. The commission would be distributed among Nigerian political and military officials as follows: 5% for the Nigerian Air Force, 5% for the political party, 2 1/2% for the medical group, 2 1/2 % for a cabinet minister, 2 1/2% for other defense personnel, and 2 1/2 % for Akindele. (A. 221) The Memoranda noted that Akindele had explained that Nigerian officials usually demanded and expected such payments from contract bidders. (A. 213 and 219) Faced with these demands, Kirkpatrick's former management apparently agreed to make payments to Akindele with the understanding that he would cause bribes to be paid to representatives of the Nigerian government.

Kirkpatrick and its former chairman, Harry Carpenter, each pled guilty to one count of violating the Foreign Corrupt Practices

Act, 15 U.S.C. § 78dd-2 ("FCPA"). The company was sentenced to a fine of $75,000 to be paid over a period of five years. (A. 52) Mr. Carpenter was sentenced to a fine of $10,000 and 200 hours of community service. (A. 31) Since the mere offer of payment or agreement to pay alone violates the FCPA, the prosecution against Kirkpatrick's chairman involved a carefully worded offer of proof which did not establish that any bribes were actually paid to anyone, only that the former chairman intended to pay a bribe.

At the sentencing of Kirkpatrick, the Government expressed its concern about the potential political impact of the case:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case [sic] cannot be underestimated . . . . I can say that the [G]overnment of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the [G]overnment of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.
>
> I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]epartment has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme. . . .[1]

(A. 45)

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[1] The Assistant United States Attorney also advised the court that the proposed recipients of the bribes included very prominent military figures still in power in Nigeria.

The Civil Action

Following the conclusion of the criminal action, Environmental Tectonics Corporation ("ETC") brought this action in United States District Court for the District of New Jersey and, on July 14, 1986, filed an amended complaint (the "Complaint"). (A. 54-120) ETC alleged jurisdiction based upon 18 U.S.C. § 1964, 15 U.S.C. § 15 and principles of pendent jurisdiction. (A. 58) ETC claimed violations of the Robinson-Patman Act, 15 U.S.C. § 13(c),[2] the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C §§ 1962(b), (c) and (d), and the New Jersey Anti-Racketeering Act, N.J.S. 2c:41-2.

The Complaint against Kirkpatrick and Kirkpatrick International[3] alleged that ETC had submitted a bid for the contract and that ETC would have been awarded the contract but for defendants' payment of bribes.[4] The Complaint also alleged that

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[2] Although not raised in Kirkpatrick's motion to dismiss, it is unclear how the facts in this case support a Robinson-Patman Act violation. *See May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1214-16 (9th Cir. 1980) (Section 13(c) did not apply where dominant nature of transaction was for services, not goods); *see also Advanced Office Sys. v. Accounting Sys. Co.*, 442 F. Supp. 418, 421-24 (D.S.C. 1977) (cases discussing definition of 'goods, wares and merchandise' under section 13(c)); *see generally* DiSabatino, *Robinson-Patman Act: Commissions*, 42 A.L.R.Fed. 276 (1978 and Supp. 1988).

[3] Nine other defendants were named: D.I.C. (Holding) Inc. is the parent of Kirkpatrick and Kirkpatrick International; Industrial Development Corporation, SA, is the parent of D.I.C. (Holding) Inc.; Harry G. Carpenter was the Chairman of the Board of Directors and Chief Executive Officer of Kirkpatrick; Robert H. Edwards was the President of Kirkpatrick; Benson "Tunde" Akindele was hired as a local agent and acted on behalf of Kirkpatrick in Nigeria; John M. Krankel was Secretary and Treasurer of Kirkpatrick; Emro Engineering Co., Inc., a subcontractor, designed the equipment sold to Nigeria and provided engineering services on the project; Robert W. Ruppert was the President and Chief Executive Officer of Emro; Ross E. Saxon was Chairman of the Board of Directors and Chief Executive Officer of Nautilus Environmentals, Inc., another subcontractor.

[4] ETC did not allege that it was the only other bidder for the contract. Indeed, there is evidence that there were at least two other bidders. *See* Memoranda.

(footnote continued)

in order to obtain the Kaduna contract defendants had agreed to pay and had paid a single bribe in a series of installments through an intermediary, Akindele, for distribution to certain unnamed Nigerian officials. (A. 63-64)

Kirkpatrick and several other defendants moved to dismiss the original complaint,[5] alleging, *inter alia*, that the action was precluded by the act of state doctrine. Kirkpatrick argued that adjudication of this action would require an inquiry into bribery and corruption of the Nigerian government. It was further argued that the litigation would require the court to interject itself into the workings of a foreign government.

Specifically, Kirkpatrick contended that this action could not be heard without adjudication of whether the Nigerian government officials were paid bribes by Kirkpatrick's agent, Akindele. The criminal action did not reach that issue because, under the Foreign Corrupt Practices Act, the mere payment of money to Akindele with the understanding that he would pay bribes constituted a violation. Second, Kirkpatrick argued that this action would necessarily involve proof as to the identity of the individual

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(A. 213) Further, ETC did not allege that its bid was the lowest bid, or even that its bid was lower than Kirkpatrick's bid. *See* Complaint. (A. 54-120) Although discovery was stayed by the district court and therefore it is not in the record, it is believed that the evidence will show Kirkpatrick's bid, including the alleged illegal payments, was lower than ETC's bid.

[5] Prior to filing the Complaint, plaintiffs served three sets of interrogatories and requests for documents upon Kirkpatrick. The district court ordered on March 12, 1986 an accelerated discovery schedule. During discovery, ETC obtained certain documents and interrogatory responses from defendants Kirkpatrick, Carpenter and D.I.C. Holdings. ETC also took the deposition of Kirkpatrick's former chairman, Harry Carpenter, where Carpenter asserted the Fifth Amendment because of Nigeria's continued interest in the case. Kirkpatrick filed its motion to dismiss on May 2, 1986, after which all discovery was stayed on May 30, 1986. However, plaintiff did file the Complaint on July 14, 1986. The district court asked the parties to brief specific questions on the act of state issue, (A. 135-37) and because the court considered the parties' additional submissions, the court turned Kirkpatrick's motion to dismiss into a motion for summary judgment under Fed. R. Civ. P. 56.

officials and representatives who allegedly accepted bribes and of all the specifics of the bribery. In the criminal prosecution, such specific information was superfluous since there was no need to prove that a bribe was actually ever paid. Third, Kirkpatrick argued that this action, unlike the criminal action, would adjudicate whether demanding and receiving bribes is customary to the Republic of Nigeria. This issue cannot be avoided since, in order for ETC to prove causation, ETC would have to prove that it would have been awarded the contract without paying a bribe. A primary defense of Kirkpatrick would be to show that bribes are commonly extorted by Nigerian government officials and that in order to do business with the Nigerian government, bribes must be paid to its officials and representatives. Thus, defendants would necessarily attempt to prove that ETC would have been forced to pay a similar bribe in order to be awarded the contract.

In considering the act of state issue, the district court invited the Department of State to comment on whether it objected to adjudication of this action on foreign relations grounds. The State Department responded by letter (the "Sofaer Letter") (A. 267-69), stating that adjudication required caution and due regard to foreign sovereign sensibilities and could prove detrimental to foreign relations with Nigeria. (A. 269) However, the letter also stated, in contradiction to its cautions, that the State Department adopted the position of the Solicitor General, as expressed in its amicus briefs to this Court in *Industrial Investment Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), and in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) that adjudication was not barred by the act of state doctrine to the extent that judicial inquiry delved only into the motivations of the Nigerian government's decision to award the contract and not into the legality of the award. (A. 267-68) The district court determined that the Sofaer Letter provided no guidance as to whether the action should proceed. (A. 307)

While the district court awaited a response from the State Department, counsel for ETC wrote to the Nigerian Embassy

in Washington, D.C. seeking a statement that the Nigerian government had no objection to adjudication of this action. (A. 124-126) The Republic of Nigeria did not respond to ETC's request. Nor has the Nigerian government ever sought to invalidate the contract or take any action against Kirkpatrick (A. 173) and in fact performance under the contract continued and was almost complete at the time this case was before the district court. (A. 174-75)

The Decisions

The district court dismissed the case as barred by the act of state doctrine (hereinafter the "District Court Opinion") (A. 277-315), stating that ETC could not prove its claims without establishing that the Nigerian officials violated Nigerian law by accepting payment of a bribe: "[r]esolution of these critical issues necessarily requires judicial inquiry into the acts of the Republic of Nigeria, its officials or its representatives and, as well, may affect the conduct of foreign policy of this country." (A. 296) The district court found an "indispensible ingredient" of ETC's claims requires "establishing the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate Nigerian law." (A. 298) The Court concluded that the establishment of corruption by high Nigerian Government and military officials "necessarily implies a criticism of the Republic of Nigeria." (A. 298) The district court found the State Department's comments to be inconclusive because the court could not hear the case and heed the State Department cautions to limit discovery without compromising its judicial role. (A. 305)

The Third Circuit reversed and remanded the case, finding *inter alia*, that the act of state doctrine was not a bar to ETC's claims because (1) ETC's claims only require an inquiry into the motivations behind, rather than the legality of, the Nigerian government's acts, and (2) defendants failed to prove that the litigation would cause a demonstrable threat to foreign relations (hereinafter the "Third Circuit Opinion").[6] (A. 317-346) In its

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[6] The Third Circuit, in remanding the case to the district court, also found that the Complaint had sufficiently alleged a pattern of racketeering activity under RICO and standing to sue under the Robinson-Patman Act.

opinion, the court acknowledged that the award of the contract was a sufficiently formal expression of sovereign interests to trigger the act of state doctrine (A. 327) and that such an award does not fall within a commercial exception since the decision must have involved national security concerns that "are far from routine." (A. 327) However, the Third Circuit found that adjudication of ETC's claims would simply require a factual determination of whether the Nigerian officials were motivated by a bribe in awarding the Kaduna contract and that the act of state doctrine did not foreclose judicial scrutiny of the motivations behind an act of state. (A. 331-32) Further, the court found, based on the Sofaer Letter, that the conduct of American foreign policy would not be threatened by adjudication of ETC's lawsuit. (A. 333-34)

Kirkpatrick petitioned this Court for a writ of certiorari which this Court granted on June 26, 1989, limited to the act of state issue.

SUMMARY OF THE ARGUMENT

The Third Circuit erred in declining to apply the act of state doctrine to this case. In addition to reaching the wrong conclusion, the Third Circuit analyzed the act of state issue by applying a standard which this Court has never recognized as the proper approach to act of state questions. This Court should reverse the Third Circuit's erroneous holding and take this opportunity to guide the lower courts back to a flexible approach to the act of state doctrine which balances the various considerations raised on a case-by-case basis.

I.

The Third Circuit reasoned that the act of state doctrine did not apply to bar ETC's claims because adjudication did not require a determination of the validity of the contract award to Kirkpatrick, but rather only an inquiry into the motivations behind the Nigerian government's act. In fact, the validity of the Nigerian government's award is at issue because in order for ETC to prevail it must prove its direct injury by showing that it would have been awarded the contract but for the Nigerian government's demand and acceptance of a bribe.

Even if the validity of the award were not in issue, the Third Circuit has narrowed the act of state doctrine by applying a distinction between cases which require inquiry into the motivation behind a foreign sovereign's act of state and those cases which require a determination of the validity of the foreign sovereign act of state. The motivation-validity distinction is not supported by this Court's decisions and is inconsistent with this Court's flexible approach to the doctrine as set forth in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Further, the distinction is not a meaningful one in many factual contexts, including in this action, where motivation and validity are not separable.

The Third Circuit, without supporting analysis, also made reference to public policy considerations as another ground for rejecting application of the act of state doctrine in this case. However, public policy interests do not require rejection of the doctrine in this case since those interests are protected by the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 *et seq.* (the "FCPA"), which provides for government regulation of foreign bribes. Nor does the fact that there was a criminal prosecution under the FCPA suggest an exception to the doctrine. To the contrary, United States regulatory objectives as set forth in the FCPA are met through government enforcement, as in this case, and Congress made no provision for a private right of action under this statute.

II.

In resolving Kirkpatrick's act of state defense, this Court should apply the flexible case-by-case approach to the doctrine articulated in *Sabbatino*. Consideration of the several factors raised by this case including the need to determine the motivation and validity of the contract award, dictates application of the doctrine.

First, the award of the military contract at issue here is an official sovereign act of the kind traditionally protected by the act of state doctrine. It is neither ministerial nor commercial in nature but is a fundamental sovereign act bearing upon the foreign sovereign's national security.

Second, because this lawsuit cannot be resolved by discoverable and manageable standards and raises policy issues beyond the proper function of the judiciary, ETC's claims cannot be decided by our courts. The court cannot and should not inquire into the process by which the Nigerian government awarded the military contract to Kirkpatrick nor can the court, if it finds the contract was invalidly granted, determine to which other bidder, if any, the Nigerian Government would have awarded the contract. The need to resolve these issues, which raise political question considerations and principles of comity, warrants application of the act of state doctrine to this case.

Third, the position of the State Department is not controlling, even when it is clear and unambiguous that a lawsuit presents no foreign policy concerns, which was not the State Department's position in this case. Six Justices of this Court rejected the *Bernstein* exception in *Citibank*, as did this Court in *Sabbatino*. The judiciary should not abdicate its responsibility to determine the justiciability of a case. Further, the position of the Executive has been erratic both in its views of the doctrine generally and in its representations concerning the international political implications of the sovereign acts at issue in this case. Indeed, the very ambiguity of the State Department's position, by vacillating in this case, demonstrates the wisdom of judicial decision-making in act of state matters. Moreover, the political question considerations raised by this case have always been the exclusive jurisdiction of the judiciary. Thus, in the final analysis it is appropriate for the judiciary to determine the applicability of the act of state doctrine.

ARGUMENT

I

THE JUDICIALLY-CREATED DISTINCTION BETWEEN MOTIVATION AND VALIDITY SHOULD NOT BAR APPLICATION OF THE ACT OF STATE DOCTRINE TO THIS CASE

Although no opinion of this Court appears to support the proposition, some lower courts have distinguished between cases which require a determination of the validity of an act of state and those which require only a determination of the motivation behind an act of state.[7] In this case, the Third Circuit determined that adjudication of ETC's claims would only require inquiry into the motivation behind the Nigerian government's award of a military contract to Kirkpatrick and would not require a determination of the validity of that contract. The Third Circuit found the act of state doctrine inapplicable, holding that the doctrine does not apply to actions in which the motivation but not the validity of a foreign government's sovereign acts are at issue. (A. 332) In doing so, the court relied upon prior decisions in the Third Circuit which it believed had similarly used a motivation-validity distinction to find the act of state doctrine inapplicable. *See Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). Decisions in other lower courts, including the Ninth and Second Circuits, have rejected the distinction. *See O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987), *cert. denied*, 109 S. Ct. 303 (1988); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Hunt v. Mobil*

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[7] This Court has held that the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts [of] a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (hereinafter "Citibank").

Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). *Cf. Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

The Third Circuit erred in its refusal to apply the act of state doctrine to this case. First, adjudication of ETC's claim does require a determination of the validity of the military contract awarded to Kirkpatrick by the Nigerian government. Second, the validity-motivation distinction used by the Third Circuit is inappropriate as a rule to limit application of the act of state doctrine and is inconsistent with the flexible case-by-case approach which this Court enunciated in *Sabbatino*, 376 U.S. at 428. Third, the Circuit Court's stated policy reasons for not applying the act of state doctrine – that it inhibits enforcement of United States regulatory interests – should not preclude application of the doctrine to foreign bribery cases.

1. *The Validity of the Nigerian Government's Contract Is at Issue in this Case*

The Third Circuit erroneously concluded that the legal validity of the Nigerian government's act in awarding the military contract to Kirkpatrick is not at issue in this case. It reached this conclusion by finding that ETC "does not seek to have the Air Force contract invalidated."[8] (A. 332) While ETC does not seek

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[8] The court also based its conclusion on the fact that ETC was not seeking compensation from the Nigerian government and that no Nigerian official was named as a defendant. Third Circuit Opinion. (A. 332) The fact that neither the foreign sovereign nor any of its officials is named in the complaint has never been dispositive of whether the validity of an act of state is at issue for purposes of determining the doctrine's applicability. *See O.N.E. Shipping*, 830 F.2d at 452 (the act of state doctrine applies "regardless of whether the foreign government is named as a party to the suit"); *Clayco*, 712 F.2d at 407 (the conclusion that judicial scrutiny would embarrass the political branches of our government in the conduct of foreign policy "is unaffected by the fact that the ruler was not named as a party"); *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) ("[the] private litigant may raise the act of state doctrine, even when no sovereign state is a party to the action. The act of state doctrine is apposite whenever federal courts must question the legality of the sovereign acts of foreign states") (citations omitted).

a declaratory judgment that the Nigerian government's award of the contract is invalid, the practical effect of the factual findings necessary for ETC to prevail in its claim for damages is to find the contract invalid on the basis of the illegal acts of Nigerian government officials. ETC must prove that a bribe was actually paid to one or more Nigerian officials and that the bribe caused the Nigerian government to award the contract to Kirkpatrick. ETC must also prove that but for the payment of the bribe, the Nigerian government would have awarded the contract to ETC and that it would have done so without the payment of a bribe. It is this factual finding which gives rise to plaintiff's claim of injury. Therefore, plaintiff's claim necessarily depends upon finding invalid the contract award to Kirkpatrick. If the validity of the Nigerian government's award to Kirkpatrick is assumed, as it must be under the act of state doctrine, *see Dunhill*, 425 U.S. at 695, *Sharon v. Time, Inc.*, 599 F. Supp. 538, 546 (S.D.N.Y. 1984) (Sofaer, J.), there is no basis for an award of damages to ETC.

Further, one element of proof in this case will be whether the practice in Nigeria is to demand payments such as Kirkpatrick made.[9] ETC will presumably seek to prove it would have obtained the contract without the payment of a bribe and Kirkpatrick

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[9] There is evidence to this effect because Kirkpatrick's former management was told by Akindele that the Nigerian government expected a 20 percent payment in connection with the award of government contracts. *See* Memoranda. (A. 213 and 219) Further, it is recognized that in many parts in the world, particularly in developing countries, bribery of foreign governments is a standard, customary and accepted method of doing business, even though such a practice may be contrary to the stated policies of those governments. *See, e.g.*, Maurice, *Questionable Overseas Payments: Going Around One More Time*, 15 Gonzaga L. Rev. 459, 462 (1980). *Cf. Hatzlachh Supply Inc. v. Savannah Bank of Nigeria*, 649 F. Supp. 688, 692 (S.D.N.Y. 1986) (plaintiff argued against moving case to Nigeria, on forum non-conveniens grounds, by arguing that Nigeria could not provide an adequate forum because of purported corruption there, citing a CBS "60-Minutes" broadcast in which Lagos, the capital of Nigeria, is described as lawless and corrupt); *SEC v. International Tel. & Tel. Corp.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,586 (case involving alleged failure to disclose questionable payments in order to obtain business from, among other countries, Nigeria).

will seek to prove that the Nigerian government would not have awarded the contract to ETC without the same payment Kirkpatrick was required to make. Since bribery and the acceptance of a bribe by a government official are illegal acts under Nigerian law, *see* Third Circuit Opinion, n. 4 (A. 322); Nigerian Penal Law (A. 348), a determination that bribery caused the Nigerian government to award the contract to Kirkpatrick could not be made without finding that certain Nigerian officials committed illegal acts. Thus, this case will require a judicial determination of whether the Nigerian government was corrupted in this case and whether it is the practice of the Nigerian government to act in this corrupt fashion.

A determination that a foreign sovereign's act is invalid under its own laws may be presumed to cause embarrassment and interference with the conduct of foreign affairs. As this Court observed in *Sabbatino* "[a]n inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongfully made, would be likely to be highly offensive to the state in question." 376 U.S. at 415, n.17. Here, since the court would need to determine that ETC should have been awarded the contract and thereby to invalidate the award of the contract to Kirkpatrick, adjudication of this case would necessarily require just such an offensive inquiry.[10] In reaching its conclusion that "adjudicating [ETC's] claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts," (A. 335) the Third Circuit failed to analyze the facts and context of this case. Its conclusion is simply erroneous when the issues raised by this case are analyzed.

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[10] The district court recognized that adjudicating this case would cause embarrassment to the Nigerian government: "[p]roof by ETC requires, as mentioned, establishment of corruption by high Nigerian Government and military officials and necessarily implies a criticism of the Republic of Nigeria . . . ." (A. 306)

2. *The Motivation-Validity Distinction Used by the Third Circuit Is Not an Appropriate Guide to Application of the Doctrine*

Even if the validity of the Nigerian contract did not need to be determined here, the motivation-validity distinction used by the Third Circuit should not be used as a rule to limit application of the act of state doctrine because it does not have broad application to different facts and circumstances, as analysis of the cases in this Court as well as in the lower courts reveals. The issue of motivation arises in many different legal and factual contexts so that a rule prohibiting application of the act of state doctrine to cases requiring inquiry into the motivation behind a foreign government's act does not have the flexibility necessary to meet the myriad of situations which may arise. At most, therefore, the extent to which judicial inquiry will determine or touch upon the validity of, and motivation behind, a foreign act of state should be one of a number of factors considered by courts in determining the applicability of the doctrine to a particular case. *See infra*, point II.

(a) *No Decision of this Court Supports the Distinction*

This Court has found that a flexible approach should be taken toward the act of state doctrine so that it may be applied as necessary on a case-by-case basis. *See Sabbatino*, 376 U.S. at 428; *Citibank*, 406 U.S. at 763. The motivation-validity distinction, as applied by the Third Circuit, is inconsistent with that principle. No case decided by this Court has ever permitted our courts to find the act of a foreign sovereign invalid, with a few carefully carved out exceptions not applicable here, let alone a direct finding of illegal conduct by a foreign government as would be required in this case. In those cases where this Court has considered application of the act of state doctrine in the context of plaintiffs' assertion of antitrust violations[11] the decisive consideration

[11] *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

appears to have been the extent to which the conduct of the foreign government was involved in plaintiffs' claims; in the antitrust cases where this Court rejected the act of state doctrine, the conduct of the defendant, and not the act of the foreign sovereign, was at the crux of the plaintiffs' allegations.

In *American Banana*, this Court applied the act of state doctrine where plaintiff alleged that the anticompetitive conduct of the defendant had caused Costa Rica to seize plaintiff's property. Although one aspect of the Court's opinion, that the antitrust laws do not reach conduct outside the United States, has been subsequently discredited, this Court has never reversed its position that both the validity of as well as the motivations behind a foreign sovereign's acts are immune from judicial scrutiny:

> The fundamental reason is that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad.

213 U.S. at 358. Therefore, it appears from this Court's decision in *American Banana* that the act of state doctrine bars inquiry into the motivation behind, as well as the validity of, the sovereign acts of a foreign government.

Although this Court's decisions in *Sisal Sales* and *Continental Ore* make clear that the antitrust laws apply when actions outside the United States have an anticompetitive effect within the United States, neither *Sisal Sales* nor *Continental Ore* involved the need to make judicial findings directly relating to the foreign government's sovereign act. Unlike *American Banana*, in *Sisal Sales* this Court allowed the United States Government to secure an injunction against defendants, who had allegedly conspired and unlawfully acted to control the importation and sale of sisal from Mexico. The Court found defendants' conduct was not protected by the doctrine applied in *American Banana* because the Government complained of a violation of United States laws

within the United States by parties subject to its jurisdiction "not merely of something done by another government at the instigation of private parties." *Sisal Sales*, 274 U.S. at 276. However, unlike what would be required in this case, the Court in *Sisal Sales* found there was no need to make any factual or legal findings relating to the foreign legislation but only to defendants' conduct (although the defendants were aided by discriminating legislation). *Id.* at 276.

In *Continental Ore*, this Court upheld an antitrust complaint alleging that defendants, suppliers of vanadium, a metal product, conspired to monopolize the market in vanadium in Canada to the exclusion of plaintiffs; the Canadian government was indirectly involved in plaintiffs' claims because of legislation which allowed an agent of the government to control the purchase of vanadium. However, since plaintiffs did not question the validity of any action taken by the Canadian government or its agent, this Court found that the defendants' acts were not protected by the fact that their conduct "involved some acts by the agent of a foreign government." 370 U.S. at 706. In reaching its decision, this Court specifically observed that there was no indication that any Canadian government official "approved or would have approved" of the alleged monopolization. *Id.*[12]

Thus the decisions in *Sisal Sales* and *Continental Ore* were not predicated upon a distinction between validity and motivation

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[12] Although some courts have doubted that the holding of *American Banana* survived *Sisal Sales* and *Continental Ore*, others have disagreed. *Compare Mitsui*, 594 F.2d at 52-54 (doubting *American Banana*) *with Hunt*, 550 F.2d at 73-75 (finding *American Banana* still viable in part) and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 109-110 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (hereinafter *Occidental Petroleum*)(same). In *Sabbatino*, this Court cited *American Banana* as a case supporting the principles of *Underhill*. 376 U.S. at 416. *American Banana* can plainly be distinguished as a case more directly involving the acts of a foreign government. In fact, although *American Banana* is generally compared with this Court's consideration of the act of state doctrine in the context of antitrust claims, the case is more closely aligned with this Court's consideration of the doctrine in the context of foreign expropriations.

but upon the minimal government involvment and the lack of necessity to scrutinize *any* governmental act. This case, unlike *Sisal Sales* or *Continental Ore*, would require a judicial finding that officials of the Nigerian government accepted a bribe, the bribe caused the government to award the military contract to Kirkpatrick, and the contract should have been awarded to ETC.

Nor do the three cases in which this Court considered the act of state doctrine in the context of the Cuban expropriations support the Third Circuit's decision.[13] In each of those cases, this Court reaffirmed that the act of state doctrine bars review of the acts of a foreign state within its own territory. In *Sabbatino*, a case involving a claim by United States nationals to the proceeds of a sugar sale from property expropriated by the Cuban government, this Court held that the act of state doctrine barred inquiry into the validity of the Cuban expropriation. Nor did any of the justices' opinions in *Citibank*, where this Court permitted a counterclaim for damages to be asserted as a setoff right in a case involving expropriation of a bank branch, alter the basic principle of *Sabbatino*. Finally, in *Dunhill*, this Court reaffirmed its decision in *Sabbatino* to the extent that the act of state doctrine bars consideration of the legality of the expropriation in the context of a claim by former cigar companies to the proceeds of cigar sales *subsequent to* the Cuban expropriation.

Nothing in this Court's decisions to date suggests that the act of state doctrine should not apply in this case where plaintiff's allegations directly implicate the sovereign act of the Nigerian government in a significant military procurement decision. In this regard, this case is similar to the expropriation decisions, where this Court has declined to determine the legality of an expropriation, rather than the antitrust cases where it was only necessary to examine the acts of the defendant and not those of the foreign sovereign.

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[13] *Dunhill*, 425 U.S. 682; *Citibank*, 406 U.S. 759, *Sabbatino*, 376 U.S. 398.

(b) *The Lower Court Cases Including those Relied upon by the Third Circuit Do Not Support the Third Circuit Decision*

(i) *Third Circuit Precedent*

The Third Circuit, without much supporting analysis, relied upon two prior Third Circuit cases to find the act of state doctrine inapplicable to this case, even though the facts and circumstances of those two cases were entirely dissimilar to this action. *See Curtiss-Wright*, 694 F.2d 300; *Mannington Mills*, 595 F.2d 1297.

Both *Mannington Mills* and *Curtiss-Wright* involved claims of antitrust violations which only indirectly involved conduct by a foreign government. In *Mannington Mills*, the plaintiff brought an antitrust action claiming that defendant made false representations to several foreign governments in connection with the issuance of certain patents for floor coverings. The district court dismissed the complaint in part on the ground that the validity of each of the patents should be determined by the issuing nation. 595 F.2d at 1290. In reversing, however, the Third Circuit held only that the act of state doctrine did not bar plaintiff's suit because the governments' conduct in granting a patent is not the type of sovereign activity which would concern the executive branch in the conduct of foreign affairs. *Id.* at 1294.

In *Curtiss-Wright*, the plaintiff alleged that defendant had monopolized the worldwide market in the sale of certain surplus jet engine parts as the result of anticompetitive activities in violation of the Sherman Antitrust Act. 694 F.2d at 302. The defendant alleged that the case would require inquiry into the motives of foreign governments in refusing to purchase from plaintiff, but in fact, as the court found, the thrust of plaintiff's allegations involved only the defendant's monopolistic practices which included anticompetitive conduct within the United States. *Id.* at 303-04. As the court observed, the complaint "treats the foreign governments, not as wrongdoers against plaintiff, but as fellow victims . . . ." *Id.* at 303. The Third Circuit determined that plaintiff's challenge was to the anticompetitive effect of the defendant's

activities, and not to the validity of the decisions by foreign governments to boycott it.[14] Although the court suggested that this Court's decision in *Continental Ore* refuted defendants' contention that the act of state doctrine barred inquiry into the motivations behind the military procurement decisions of the foreign governments, it did not find that such an inquiry would be required for plaintiff to prevail in the case. Nor did the court suggest that the act of state doctrine could never bar inquiry into the motivation of a sovereign act.

In this case, the Third Circuit did not examine the different factual and legal contexts in which the *Mannington Mills* and *Curtiss-Wright* cases arose. However, neither *Curtiss-Wright* nor *Mannington Mills* involved the kind of direct factual finding of illegality by a foreign government that adjudication of this case will require. Therefore, permitting inquiry into the motivation of the Nigerian government in this case goes far beyond anything previously suggested by *Mannington Mills* or *Curtiss-Wright*.

Although not relied upon by the Third Circuit, at least one other circuit court decision has permitted some inquiry into a foreign government's motivation, albeit under circumstances not applicable to this case. The Fifth Circuit, in a divided decision in *Mitsui*, reached a conclusion which would permit some inquiry into motivation limited to the issue of plaintiffs' damages. The court declined to apply the act of state doctrine in a case where plaintiffs alleged that defendants conspired to eliminate competition in the lumber business in Indonesia by, among other things, causing the Indonesian Government to cancel an agreement with plaintiffs and to deny it a license, 594 F.2d 55-56. The Fifth Circuit found, as this Court did in *Continental Ore*, that

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[14] In both *Mannington Mills* and *Curtiss-Wright*, the Third Circuit raised, but did not decide, the issue of whether jurisdiction should be declined as a matter of international comity. *Mannington Mills*, 595 F.2d at 1294-98; *Curtiss-Wright*, 694 F.2d at 305. Since the act of state doctrine was "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government," *Citibank*, 406 U.S. at 762, the Third Circuit should have considered comity as a part of the act of state doctrine and not as a separate legal principle which it declined to reach. *See infra*, Point II(2).

neither the validity of the Indonesian regulations nor the legality of the behavior of the Indonesian government was in question. *Id.* at 49. The court found it was unnecessary on the issue of liability to determine whether plaintiffs would have received the license since plaintiffs alleged damages other than their failure to obtain the license. *Id.* at 54. The court observed that the Indonesian government's motivation for denying plaintiffs the license was not essential to plaintiffs' case since plaintiffs did not need to prove that the defendants' acts were the sole cause of injury to plaintiffs. *Id.* However, the court held that inquiry into the motivation behind the Indonesian government's actions limited solely to the measure of plaintiffs' damages "does not trigger the type of special political considerations protected by the act of state doctrine." *Id.* at 55.[8] *See also Northrop Corp. v. McDonnell Douglas, Corp.*, 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983) (Ninth Circuit declined to decide whether the act of state doctrine barred inquiry into foreign procurement decisions to establish the amount of damages in an antitrust action since the fact of damages could be determined without reference to those decisions).

In this case, ETC has not alleged any injury other than the issuance by the Nigerian government of a military contract to Kirkpatrick based upon the payment by Kirkpatrick of a bribe. Therefore, in this case, unless ETC can prove both that the bribe was the but-for cause of the Nigerian government's award of this contract to Kirkpatrick and that ETC would have been awarded the contract if a bribe had not been paid, it cannot allege injury sufficient to state a claim. Therefore, unlike *Mitsui* and *Northrop*, adjudication of ETC's claim necessarily requires the court to inquire into the validity and motivation of the sovereign acts of the Nigerian government. Furthermore, that inquiry would involve "the legality of the behavior of the [Nigerian] government." *Mitsui*, 594 F.2d at 53; *see Continental Ore*, 370 U.S. at 706.

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[8] The dissent, agreeing with the district court that "the damage complained of stems directly from the denial of the government concession to cut timber," would have held the action barred by the act of state doctrine. 594 F.2d at 56.

(ii) *Other lower court cases*

In contrast to the Third Circuit's decision in this case, other circuits have rejected the motivation-validity distinction in cases where the issue of motivation cannot be separated from the validity of the act or where the act of the foreign government was a direct cause of the injury to the plaintiff, both of which are applicable to this case. *See Clayco*, 712 F.2d 404; *Hunt*, 550 F.2d 68; *Occidental Petroleum*, 331 F. Supp. 92.[16] These cases have addressed the issues in keeping with the purposes behind the act of state doctrine as expressed by this Court and contrary to the mechanistic application of the motivation-validity distinction used by the Third Circuit.

In a decision directly contrary to the Third Circuit decision in this case although based upon, facts very similar to this case, the Ninth Circuit in *Clayco* found the motivation-validity distinction inapplicable. In *Clayco*, plaintiff alleged that defendant, Occidental Petroleum Corporation, made secret payments to the Petroleum Minister and son of the ruler of Umm Al Qaywayn, to secure a valuable off-shore oil concession which otherwise would have gone to plaintiff Clayco.[17] Occidental had previously entered into a consent decree with the SEC. The court rejected the contention that the act of state doctrine was inapplicable because adjudication required only an inquiry into the motivation behind the foreign sovereign's act and not its legal validity. The Ninth Circuit, declining to adopt the argument that the act

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[16] Although decided by analyzing the political question doctrine, a Fifth Circuit case which would have required a factual determination identical to that in *Occidental Petroleum* also highlights that motivation and validity are inseparable when a court examines acts taken by a foreign sovereign. *See Occidental of UMM Al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

[17] In *Clayco*, plaintiff apparently claimed that the Government had already agreed to give it the contract and then revoked its decision when defendant paid the bribe. 712 F.2d at 405. In this regard, plaintiff's proof in *Clayco* might have been easier than the morasse which would be caused by this case where ETC would need to prove that the Nigerian government would have awarded the contract to ETC over all other bidders.

of state doctrine is inapplicable to all cases where only motivation is at issue, pointed out that in the case before it, "plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery [and] thus embarrassment would result from adjudication." 712 F.2d at 407. In reaching its conclusion that the act of state doctrine barred plaintiffs' claim, the Ninth Circuit focused upon the degree to which judicial scrutiny would "impugn or question the nobility of a foreign nation's motivation. . ." *Id. quoting Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976).

The *Clayco* court relied upon *Occidental Petroleum*,[18] a case in which plaintiffs alleged that the Ruler of Umm al Qaywayn had issued a fraudulent territorial decree to enable defendants rather than plaintiffs to exploit oil and gas in a certain area. In *Occidental Petroleum*, the court found the act of state doctrine barred the antitrust claims which implicated the foreign sovereigns as "co-conspirators." 331 F. Supp. at 110. The court concluded that plaintiffs' allegations directly related to the conduct of the foreign state, and thus the court's inquiry would involve "the authenticity and motivation of the acts of foreign sovereigns [which] would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert." *Id., citing Sabbatino*, 376 U.S. at 423-24.

Similarly, the Second Circuit, in *Hunt*, wrestled with a case where adjudication would have required inquiry into the validity and motivation behind sovereign acts of Libya. In *Hunt*, plaintiff, an independent oil producer with a Libyan oil concession, alleged that defendants, major oil producers in Libya and the Persian Gulf, had unlawfully combined and conspired to exclude plaintiff from Libya in furtherance of a plan to preserve their competitive advantage. As a result of defendants' actions, plaintiffs alleged, Libya first terminated plaintiffs' rights to produce and export oil and then nationalized plaintiffs' assets in Libya. The Second Circuit found the act of state doctrine applicable

[18] The case was subsequently affirmed by the Ninth Circuit on the basis of the district court opinion.

because the judicial inquiry would involve both the validity of the acts taken by Libya and "the underlying reasons" for the government's actions. 550 F.2d at 72. The court reasoned, as is true in this case, that the validity of Libya's act cannot logically be separated from the motivation behind those acts, and therefore the nexus between defendants' conduct and the government's actions made act of state concerns "inescapable." *Id.* at 76. As the Second Circuit observed, the claim "is admittedly not viable unless the judicial branch examines the motivation of the [government's] action and that inevitably involves its validity." *Id.* at 77.

Thus, prior cases determining application of the act of state doctrine have turned upon the extent to which the foreign government's sovereign act is crucial to resolving the allegations. In cases such as *Clayco* and this case in which it is alleged that bribery of a foreign sovereign led to the act of state, a defendant's conduct cannot be examined without directly implicating the foreign sovereign and its agents, and without examining the validity of the sovereign act.

3. *Public Policy Interests Are Not Thwarted by Application of the Doctrine to this Case*

In its decision barring application of the act of state doctrine to this case, the Third Circuit, again without analysis, suggests that the act of state doctrine should not interfere with implementation of the policies served by United States regulatory statutes. Third Circuit Opinion (A. 331) *citing Continental Ore*, 370 U.S. 690. However, application of the act of state doctrine frequently impacts upon United States regulatory statutes. Therefore, the fact that application of the doctrine has an effect upon enforcement cannot be dispositive of whether it should be applied in a given instance. A determination of the doctrine's applicability should involve a balancing between United States regulatory interests and the foreign policy interests protected by the act of state doctrine. *See, e.g., Mitsui*, 594 F.2d at 55.

United States regulatory interests in cases of foreign bribery are protected by the Foreign Corrupt Practices Act, 15 U.S.C

§ 78dd-2 ("FCPA"), which makes it a criminal offense to offer a bribe to a foreign official to obtain a contract. The Third Circuit did not analyze whether the regulatory interests served by the FCPA should prevent application of the act of state doctrine to foreign bribery cases because those regulatory interests outweigh the presumed foreign relations problems created by a judicial finding that a sovereign act of state was based upon the acceptance by foreign officials of an illegal bribe.

Under the FCPA, the Justice Department and the SEC are alone authorized to enforce the Act. Since the FCPA does not provide for private remedies, presumably Congress did not consider private rights of action necessary to effect its regulatory scheme.[9] Indeed, there are good reasons to limit enforcement of the FCPA to the government. "[A]ny prosecution under the Act entails risks to our relations with the foreign governments involved." *Clayco*, 712 F.2d at 408. Limiting enforcement to government actions allows a judgment to be made in each case that the benefits of a prosecution outweighs any foreign policy concerns involved. This judgment, absent when a private litigant brings such an action, necessitates use of the act of state doctrine in such suits "to protect the proper conduct of national foreign policy." *Clayco*, 712 F.2d at 409. Further, permitting private actions will result in lawsuits by all disappointed bidders on foreign government contracts which will certainly have adverse consequences on the conduct of foreign policy.

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[9] When Congress wants to provide a private damage remedy, it knows how to do so and does it expressly. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979). Further, there is no reason to imply a private right of action where a statute, such as the FCPA, is designed to benefit the public and not a class of persons such as the private business competitors here. *See Cannon v. University of Chicago*, 441 U.S. 677, 690-92 (1979). Although no case has addressed the bribery section of the FCPA, a couple of courts have declined to imply a private right of action to other sections of the FCPA. *See McLean v. International Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (15 U.S.C. 78ff(c)(3)); *Lewis v. Sporck*, 612 F. Supp. 1316, 1327 (N.D.Cal. 1985) (15 U.S.C. 78m(b)(2)). In addition, some commentators have doubted the existence of a private right of action under the FCPA. *See generally* Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 Colum. L. Rev. 1085 (1979); Note, *The Foreign Corrupt Practices Act: A Private Right of Action?* 12 Vand. J. Transnat'l L. 735 (1979).

The fact that the Government brought an action against Kirkpatrick does not change the analysis. The proof required in a private litigation goes well beyond that required by the Government under the FCPA. The Government need not prove that the foreign government actually received a bribe or that payment of a bribe produced the desired results. *See* 123 Cong. Rec. S13,816, 13,820-21 (daily ed. May 5, 1977) (statement of Sen. Byrd). Indeed the government charge and offer of proof in the criminal case carefully avoided any statement as to whether any Nigerian government official received the bribe, let alone whether such a bribe caused the Nigerian government to award the military contract to Kirkpatrick or whether the Nigerian government as a practice requires such payments in connection with its contract awards. Further, the Government expressly represented to the court at sentencing that disclosure of any additional details of the investigation would have adverse political and diplomatic consequences. (A. 45). However, this suit presents a significantly greater threat of embarrassment to foreign relations than did the criminal action.

In this civil case, ETC's claim depends upon proving that the bribe was actually received by one or more officials, that the bribe caused the Nigerian government to issue the contract and that ETC would have obtained the contract without such a payment. This examination of governmental and political processes in Nigeria was unnecessary in the criminal case. A private action also has procedural differences which make it more problematic: the protection afforded by grand jury secrecy will be absent; discovery provided by the civil rules will be considerably broader and its conduct dictated by private parties; and the Executive will be unable to terminate or restrain the litigation if external events cause it to revise initial predictions on the impact upon foreign relations.[20]

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[20] The State Department in its Sofaer Letter, recognized those problems urging the district court to ensure that "caution and due regard for foreign sovereign sensibilities" (A. 269) be exercised at each relevant stage in the proceeding and advising that the court should "endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." (A. 334). The Third Circuit also noted the "dissatisfaction of foreign governments with the wide discovery authorized under the Federal Rules, finding it intrusive and overbroad," as well as the number of foreign states that have enacted "blocking laws" to bar discovery by United States courts. (A. 334)

Therefore, even when the United States Government has determined that the beneficial effects of prosecution outweighs any foreign policy concerns, the substantially more direct proof of illegal action by the foreign sovereign required in a civil case and the lack of supervision and control by the Executive might lead the Government or the courts to a different conclusion in weighing those same factors.

II

THE ACT OF STATE DOCTRINE BARS ADJUDICATION OF ETC'S CLAIMS

This Court has adopted a flexible rule concerning application of the act of state doctrine. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The modern justification for the act of state doctrine, as discussed in *Sabbatino*, is rooted in considerations of preserving the constitutional mandate of separation of powers between the federal judiciary and the political branches. *Id.* at 423-24. Essentially a counterpart to the political question doctrine, the doctrine is founded in part upon the Court's recognition that judicial entanglement in the acts of a foreign government "may hinder rather than further this country's pursuit of goals . . . in the international sphere," *id.* at 423, and that judicial review "could embarrass the conduct of foreign relations . . . ." *First National City Bank v. Banco Nacional de Cuba* 406 U.S. 759, 765 (1972). Since the viability of the doctrine "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs," *Sabbatino*, 376 U.S. at 427, the balance of relevant considerations shifts on virtually a case-by-case basis.

The act of state doctrine originally developed so that American courts would respect sovereign autonomy and international comity. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918). This concept is set forth in the Supreme Court decision in *Underhill*:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

Underhill, 168 U.S. at 252. The Court has reaffirmed more recently that the concepts of sovereign immunity and comity may justify application of the act of state doctrine. *See Citibank*, 406 U.S. at 762, 765.[a]

To effectuate the broad principles of sovereignty and separation of powers, the act of state doctrine should be applied on a case-by-case basis using a balancing process to account for the respective judicial and political concerns. See *Sabbatino*, 376 U.S. at 428; *Citibank*, 406 U.S. at 774-5; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 718 (1976) (Marshall, J., dissenting) (citing the "careful case-by-case approach adopted in *Sabbatino*"). Since the factors to be considered will vary in each case, as will the weight to be given each factor, the doctrine must be flexible enough to tailor application to the varied legal and factual circumstances of each case.

In this case, all the relevant factors mitigate in favor of application of the act of state doctrine to this case: (1) both the validity and motivation behind the Nigerian government's award of the contract to Kirkpatrick are directly in issue (as discussed in Point I); (2) the award of the contract was an act of state and does not come within the commercial exception to the doctrine;

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[a] Great Britain has adopted our act of state doctrine relying upon the reasoning of the Fifth Circuit case, *Occidental of UMM AL Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979)(hereinafter *Occidental*), in defining the parameters of the doctrine. *Buttes Gas & Oil Co. v. Hammer*, [1981] 3 W.L.R. 787 (hereinafter *Buttes*). The British *Buttes* case arose out of the same facts as *Occidental Petroleum*. In response to a libel action by Occidental claiming that Buttes had used improper methods to obtain a decree regarding oil rights (at issue in the American case), Buttes asserted the defense of justification and counterclaimed, alleging a conspiracy by Occidental to deprive Buttes of the oil rights. Lord Wilberforce applied the act of state doctrine, reasoning that to resolve these issues the court would be required to examine both the motives of a foreign sovereign and the validity of its acts. *See Buttes*, [1981] 3 W.L.R. at 809.

(3) this case will require the court to become embroiled in determining matters for which no judicial or manageable standards exist and which bear upon the practices of the Nigerian government in the conduct of its sovereign affairs of state; and (4) the Executive appears to have vacillated about the foreign policy implications in this case, as well as generally regarding the act of state doctrine, and in any event cannot determine justiciability. The latter three points are discussed below.

1. *The Award of a Military Procurement Contract by the Nigerian Government Is an Official Sovereign Act*

As found by both lower courts, the award of this contract, involving a military procurement decision by the Nigerian government, was an act of state and does not come within the exception to the act of state doctrine for purely commercial acts.[22] "The award of a military contract, particularly one for a major project, is usually influenced by national security considerations. . . ." Third Circuit Opinion. (A. 327) Sovereign acts which involve policy determinations to effect political and public interests constitute acts of state. *Remington Rand Corporation-Delaware v. Business Systems, Inc.*, 830 F.2d 1260, 1265 (3d Cir. 1987). Although this Court has never addressed the issue, lower court decisions have found a sufficient expression of sovereign public interest in military procurement decisions to constitute acts of state.[23] *See, e.g., Williams v. Curtiss-Wright Corp.*, 694 F.2d

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[22] In the Sofaer Letter, the State Department suggests that the military contract award may not involve a sufficiently official act of the foreign sovereign to constitute an act of state. (A. 269) We disagree, as apparently does the Solicitor General. "[T]here is considerable force to the conclusion by both courts below that the decision to award a military procurement contract . . . is a sufficiently 'official' expression of a state's 'public' interests to warrant application of the act of state doctrine." Solicitor General Amicus Brief to Petition For Writ of Certiorari, p. 18, n.13.

[23] Although some commentators have suggested the act of state doctrine should be limited by narrowing the scope of acts constituting acts of state, the military procurement decision here should come within any definition. *See generally*

(footnote continued)

300, 302 (3d Cir. 1982); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1048 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983). This contract is not the kind of routine government act which may be excepted from application of the doctrine as not giving rise to governmental concerns in the conduct of foreign policy. *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d. 1287, 1294 (3d Cir. 1979) ("[T]he grant of patents for floor coverings is not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of foreign affairs").[24]

Nor does the award of this contract come within the exception to the doctrine, adopted by some lower courts and by a plurality of this Court in *Dunhill*, applicable to cases involving the purely commercial activities of a foreign government. *See Dunhill*, 425 U.S. at 706 (opinion of Justice White in which Justices Rehnquist, Powell and Burger joined). Both lower courts properly rejected ETC's contention that the award of this contract was an ordinary commercial transaction. Third Circuit Opinion. (A. 328); District Court Opinion. (A. 297). The military procurement decision involved here is one of the "historically recognized governmental functions of a State [and not] the kind which theretofore had been pursued by private enterprise."[25] *Dunhill*, 425 U.S. at 696.

Note, *Limiting the Act of State Doctrine: A Legislative Initiative*, 23 Va. J. Int'l. L. 104 (1982). Further, to define acts of state narrowly might unnecessarily hamper application of the doctrine, since a government action insignificant to one country might be important to another.

[24] *Cf. Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 128, (S.D.N.Y. 1974) (Wemfeld, J.); Lowenfeld, *Litigating a Sovereign Immunity Claim — The Haiti Case*, 49 N.Y.U. L. Rev. 377, 412-22 (1974).

[25] The many officials involved in the decision to award this contract, which appears to have included the president, air force officials, party officials, ministry officials and other defense department personnel, is sufficient to determine that the nature of the act was an official expression of Nigeria's public interests, warranting application of the act of state doctrine. *See* Memoranda. (A. 217 and 221)

2. *The Political Question Doctrine and Principles of Comity Require Application of the Act of State Doctrine to this Case*

The degree to which the judiciary will become embroiled in matters which it is not equipped to handle or which are best left to the Executive is a factor to be considered in determining application of the act of state doctrine. In this regard, the doctrine may be said to apply principles of comity[26] as well as the political question doctrine. *See Citibank*, 406 U.S. at 787-88 (Brennan, J., dissenting); *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 547-53 (S.D.N.Y. 1984).[27] "The task of defining the contours of a political question such as the act of state doctrine is exclusively the function of the Court." *Citibank*, 406 U.S. at 790. In this case, there exists both "a lack of judicially discoverable and manageable standards for resolving the matter" and the necessity to make a "policy determination of a kind clearly for nonjudicial discretion . . . ." *Baker v. Carr*, 369 U.S. 186, 217.[28]

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[26] *See, e.g., Citibank*, 406 U.S. at 768 (Rehnquist, J.) (considerations of comity are a factor in determining an act of state defense); *Oetjen*, 246 U.S. 304-305 (same).

[27] The act of state and political question doctrines have been used interchangeably. *Compare Occidental*, 577 F.2d 1196, *with Occidental Petroleum*, 331 F. Supp. 92. Both cases would have required a judicial determination of the rights to an oil concession in the Persian Gulf. While both courts declined to adjudicate the issue, the Ninth Circuit declined on the basis of the act of state doctrine and the Fifth Circuit on the basis of the political question doctrine. *See also Buttes* [1981] 3 W.L.R. 787 (adopting Fifth Circuit's approach of examining the political question rationale to act of state doctrine); Note, *Reflections on the Act of State Doctrine: A Fifth Wheel in Conflicts of Law*, 10 Hous. L. Rev. 1 (1972) ("the assimilation of the act of state doctrine under the 'political question' concept is a first step toward a more rational and flexible approach to the justiciability of acts of state).

[28] The House of Lords in *Buttes* found it could not adjudicate that case by reasoning that the British court would be without manageable standards, placing it in a "judicial no-man's land." [1981] 3 W.L.R. at 810.

Resolution of ETC's claims would require the district court to interject itself into the process of the military procurement decisions of the Nigerian government as well as the policies and practices behind those decisions. First, the district court would need to determine what considerations and factors went into the Nigerian government's decision to award the contract to Kirkpatrick. Then, a determination would have to be made concerning whether the payment, or promise of payment, of a bribe had the effect of causing the Nigerian government to award the contract to Kirkpatrick. These inquiries alone, involving the motive behind and validity of a sovereign act of the Nigerian government as well as illegal conduct by officials of the Nigerian government, should be precluded by[29] the act of state doctrine.

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[29] Neither the provisions of Nigerian law nor analogous provisions in United States law establish sufficiently clear standards for judicial inquiry into sensitive areas of a foreign sovereign's internal affairs. *See Sabbatino*, 376 U.S. at 428 (no treaty or other unambiguous agreements concerning controlling legal principles exists). Even within our own legal system, there has been considerable disagreement about the kinds of foreign payments which should be deemed "corrupt" and thus actionable; under the FCPA for example, an entire class of payments to foreign officials – "grease payments" – are specifically condoned under federal law. In limiting the scope of the FCPA, Congress identified both the lack of universally accepted standards and the need to provide parties dealing with foreign government officials clear notice of what the statute prohibits.

> The language of the bill is deliberately cast in terms which differentiate between corrupt payments and facilitating payments, sometimes called "grease payments." In using the word "corruptly," the committee intends to distinguish between payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.
>
> While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, *the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments....*

(footnote continued)

However, even if ETC were permitted to establish an illicit motive by the Nigerian government for its contract award to Kirkpatrick, the inquiry would not end there. ETC must also prove that Kirkpatrick's payment of a bribe was the cause of ETC's injury. To do so, ETC must prove that it would have been awarded the contract if Kirkpatrick had not paid a bribe. Such an inquiry necessitates complex determinations which go beyond the judiciary's competence and beyond any findings required in other cases where the courts have declined to apply the act of state doctrine.

Since bidders other than Kirkpatrick and ETC were involved,[30] ETC must demonstrate that it would have been awarded the contract over all other bidders. To reach such a determination, the court will be required to examine the Nigerian procurement process and to determine not only what considerations went into the Nigerian government's decision to award the contract to Kirkpatrick but also, if that award is found to have been improperly granted, what considerations *should* have been used in awarding the contract. This inquiry is required for the court to determine whether ETC's bid should have or would have been accepted by the Nigerian government instead of any of the other bids. Our courts are not competent to decide this issue and it is unlikely that the Nigerian government would cooperate in any such effort.[31] The considerations involved in the Nigerian

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H. Rep. No. 95-640, 95th Cong., 1st Sess. at 5 (Sept. 28, 1977) (emphasis supplied). *Accord* 123 Cong. Rec. H11932 (daily ed. Nov. 1, 1977).

No such explicit statutory guidance is presented in the statute Nigeria outlawed bribery. In analogous situations involving state-federal comity, federal courts abstain from interpretations of state law that touch on sensitive areas of state sovereignty. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). International comity demands comparable restraint.

[30] There is evidence that there were at least two other European bidders, however the record does not disclose the amount or nature of those bids. (A. 213)

[31] *See Ipitrade Int'l v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) (Nigeria entered into a contract under which it agreed to submit any

(footnote continued)

government's determination could – and likely did – include sensitive and confidential information involving national security concerns. Certainly our Government would not want the courts of another country to make such an inquiry regarding our national security decisions.[22]

Finally, the court would have to resolve the issue of whether ETC would have been required to pay a bribe in order to obtain the contract. In this connection, it is unknown what proof ETC would seek to present to show that it would have obtained the award without a payment, but Kirkpatrick, in furtherance of its defense that ETC would have been required to make a payment as would any successful bidder to this contract, would seek to prove that it is the practice of the Nigerian government to require such payments. That inquiry would involve a potential finding that the practices of the Nigerian government are inconsistent with its stated policy as reflected in its law which makes it illegal for a government official to accept a bribe. This inquiry is also plainly inappropriate for our courts.

Thus, this case requires resolution of issues which are either not possible or not appropriate for judicial resolution. As Lord Wilberforce so aptly stated in *Buttes*:

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disputes to arbitration by the International Chamber of Commerce, Paris, France, but subsequently refused to appear, plead, answer or otherwise participate); *United Export Trading Co. v. Federal Republic of Nigeria*, 4 Fed. R. Serv. 3d 311 (1986) (court imposed a large fine against the Republic of Nigeria which failed to respond to requests for production of documents and notices for depositions). Further, the ability to obtain documents and information would be severely hampered by Nigerian law. *See* Official Secrets Act of 1962, No. 29 (Sept. 13, 1962), which makes it a crime to disclose any information that the Nigerian government deems "classified."

[22] Indeed in civil actions concerning our government, we insulate the deliberative processes of the executive and the legislature from direct scrutiny of subjective motive through invocation of various immunity doctrines. *E.g. United States v. Nixon*, 418 U.S. 683, 705, 708 (1974) (identifying executive privilege as necessary for officials "to be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately"); *United States v. Johnson*, 383 U.S. 169 (1966) (immunity conferred by Speech or Debate Clause precludes inquiry into motivation of Congressman's speech or legislative acts).

> [The issues] have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass.

[1981] 3 W.L.R. at 810. Whether by operation of the act of state doctrine, the political question doctrine or principles of comity, inquiry into these issues are plainly not appropriate for judicial determination by our courts.

3. *The Executive Cannot Determine Justiciability*

The majority of this court has rejected the *Bernstein* exception created by the Second Circuit in a case involving a decree of the Hitler government of Nazi Germany to except from application of the doctrine cases where the Executive represents that application of the doctrine would not advance the interests of American foreign policy. *See Bernstein v. N.V. Nederlandsche -- Amerikaansche, Stoomvaart -- Maatschappij*, 210 F.2d 375 (2d Cir. 1954). The *Bernstein* exception would not be applicable here even under the rationale of Justice Rehnquist's opinion in *Citibank* (in which only Justices White and Burger joined) since in that case the State Department had "expressly represent[ed] to the Court that application of the act of state doctrine would not advance the interests of American foreign policy . . . ." *Citibank*, 406 U.S. at 768.

In this case, the State Department has expressed concerns about the effects of the litigation in Nigeria: "inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations." (A. 269) Then, relying upon the United States amicus briefs in *Mitsui* and *Hunt*, the State Department took the legal position that the act of state doctrine does not bar inquiry into the motivation of a foreign sovereign's acts but only their validity. "If the adjudication of this suit were to involve a judicial inquiry into the motivation of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute . . . ." (A. 269) However, the State

Department concluded that the foreign policy concerns in this case "counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings." (A. 269) The district court, observing that this statement left the court in the position of weighing foreign policy concerns in ruling upon discovery demands and evidentiary issues at trial, concluded that "[t]he suggestion of the State Department that this court conduct the litigation with an eye to foreign policy concerns is not appropriate."[23] District Court Opinion. (A. 305)

Contrary to the district court, the Third Circuit construed the Sofaer Letter to mean that "the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of [respondent's] lawsuit." (A. 333-334) The Third Circuit dismissed the expressed concerns of the State Department, finding that those statements "should be read as nothing more than a reminder to the district court of the complaints about American litigation with which the Executive has become familiar." Third Circuit Opinion. (A. 334)

The State Department position as set forth in the Sofaer Letter appears to avoid the decision which the *Bernstein* exception would permit it to make. That decision is whether a case will affect United States foreign relations without regard to whether the case should proceed under otherwise applicable judicial standards for application of the act of state doctrine. Here, the State Department advised the court that under legal standards advocated by the Executive for application of the doctrine, the case should go forward but that foreign relations might be affected. Thus, the State Department has not provided the kind of statement which would warrant application of a *Bernstein* exception. Indeed, the State Department indicated not only through the Sofaer Letter but also during the criminal proceedings that foreign policy concerns do exist. During the sentencing of Carpenter, the Government told the Court that the State

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[23] To the point, the district court stated that the suggestion of the State Department was not constitutional because it would require the judiciary to violate the principle of separation of powers. (A. 306-307)

Department was concerned about the repercussions in Nigeria of factual disclosures in this case.[*] *See supra*, p. 2; Transcript of W.S. Kirkpatrick Sentencing. (A. 45)

Even if the State Department were to clarify its position in accord with the Third Circuit's interpretation, that position should not be dispositive, as six of the nine justices of this Court agreed in *Citibank*. To follow the dictates of the State Department would require the Court "to abdicate its judicial responsibility to define the contours of the act of state doctrine so that the judiciary does not become embroiled in the politics of international relations." *Citibank*, 406 U.S. at 778. (Brennan, J., dissenting); *see* Restatement (3d) Foreign Relations Law of the United States § 443, comment h (1987).

The position of the Executive and that of the State Department has not remained constant from case to case, and indeed appears to have changed even within this case. The political considerations of the executive changes, "as surely as administrations change." *Citibank*, 406 U.S. at 792. (Brennan, J., dissenting) Thus, the separation of powers as well as even-handed application of law cannot depend upon political decisions which "vary from day to day with the shifting winds at the State Department." *Id.* at 792. A review of the various positions taken by the Solicitor General and the State Department on act of state issues reflects vacillations in positions on the general applicability of the doctrine as well as on specific foreign policy concerns in various cases. (See, *e.g.*, *Dunhill*, 425 U.S. at 725, n. 10 (Marshall, J., dissenting) (*noting* that the State Department urged application of the doctrine in *Sabbatino* and then asked the court to overrule *Sabbatino* in *Dunhill*). Indeed, the vacillation of the State Department even within this case demonstrates the wisdom of judicial decision in these cases.

While a statement by the Executive that a case would adversely impact upon our foreign policy should undoubtedly be given great weight, *see* Restatement, comment c, the fact that the Executive

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[*] The Third Circuit dismissed the Government's statements as not addressed to act of state questions and made almost a year before the Sofaer Letter.

may not object to a litigation does not make the issues appropriate for determination. "The Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim." *Citibank*, 406 U.S. at 788-89 (Brennan, J.). Nor can it be said that the Executive is indifferent to the outcome of this case. *See Citibank*, 406 U.S. at 783. The State Department has expressed concern with its consequences in Nigeria where certain officials involved in this matter are still in power. In fact, the State Department has expressed concern about the consequences of even the discovery process. Further, this case would require an inquiry into possible determination by the court that the Nigerian government acted with corrupt motives. Since senior officials of the government are still in power, the Executive cannot be indifferent to the outcome since such a finding would clearly embarrass and impede the continuation of satisfactory relations with a government or official implicated by our judiciary.

Thus, even if the Executive were to state that adjudication would not affect our foreign relations, the judiciary cannot be bound by the opinion of the Executive in determining application of the doctrine, and the political question concerns addressed by the act of state doctrine, and raised by this case, must be left to the judiciary.[28]

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[28] Lord Wilberforce reached the same conclusion in *Buttes*. "I appreciate . . . that no indication has been given that Her Majesty's Government would be embarrassed by the court entering upon these issues. But, the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending as they must upon an appreciation of the nature and limits of the judicial function." [1981] 3 W.L.R. at 809.

CONCLUSION

Our courts have never, and should not now, challenge the validity or purpose of a foreign government's sovereign act. Resolution of the issues raised by this case is precluded by principles of comity, and also by the political issues raised which are either not capable of or not appropriate for resolution by our courts. Further, if this case is not barred by the act of state doctrine, the spectre of numerous disappointed bidders for foreign government contracts seeking judicial relief plainly raises foreign policy concerns. Those concerns are not resolved by the vacillating positions of the State Department in this case, or by whatever position the Executive may finally take before this Court. The manifold purposes behind the judicially-created act of state doctrine warrant its application to this case. Therefore, we urge this Court to reverse the judgment of the Court of Appeals for the Third Circuit and find ETC's claims barred by the act of state doctrine.

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